Supreme Court, U.S.
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No. 92-293

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and
NEW YORK CITY DEPARTMENT OF FINANCE,

Petitioners,

- against -

BARBARA KRAEBEL d/b/a
BARKLEE REALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the right to a post-deprivation state court proceeding in itself satisfies federal due process when institutionalized state conduct is at issue?

2. Whether Section 1983 of Title 42 of the United States Code permits federal courts to consider federal due process claims even if state courts provide legal recourse for such claims?

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Among other causes of action, Respondent brought this proceeding under 42 U.S.C. Sec. 1983, alleging that the Senior Citizen Rent Increase Exemption Program (hereinafter described) administered by Petitioners violates Respondent's federal due process rights. The District Court dismissed said claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The District Court decision, which was not officially reported, appears App. 30-45*.

The Court of Appeals reversed said dismissal and remanded the proceeding for consideration of said due process claim. The Court of Appeals decision is officially reported as Kraebel v. Dept. of Housing Pres. & Dev., 959 F.2d 395 (2d Cir. 1992) and appears at App. 1-27.

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* Numbers after App. refer to pages in the Appendix To Petition For A Writ Of Certiorari.

ADDITIONAL RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

Fifth Amendment, United States Constitution
(Appendix A hereto, p. A-1)

Fourteenth Amendment, Section 1,
United States Constitution
(Appendix B hereto, p. A-2)

Statutory Provision:

United States Code,
Title 42, Section 1983
(Appendix C hereto, p. A-3).

COUNTERSTATEMENT OF THE CASE

The Senior Citizen Rent Increase Exemption, or SCRIE, Program exempts senior citizen tenants with incomes below a specified amount from paying rent increases. Instead, property owners with SCRIE tenants are entitled to real estate tax abatements equal to such exempt rents. If such tax abatements exceed the real estate taxes on the property in question, Petitioners are required to pay the excess in cash upon request of the property owner. New York Real Property Tax Law, Sec. 467-b, appearing App. 104-114; New York City Administrative Code, Secs. 26-405[m], 26-406 and 26-509, appearing App. 77-103.

Petitioners' descriptions of the SCRIE Program and the Amended Complaint in their Statement Of The Case are substantially accurate, but the descriptions of the decisions below are inaccurate in the following significant respects:

Petitioners imply that Respondent's SCRIE claim was dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction as well as under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted (Pet. 5*). Rule 12(b)(1) was not the basis for dismissing Respondent's claims regarding the SCRIE Program; it was the basis only for the District Court's dismissal of Respondent's claims regarding a separate program administered by Petitioners, which dismissal was

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* Numbers after Pet. refer to pages in the Petition For A Writ Of Certiorari.

upheld by the Court of Appeals and is not before this Court (App. 44-45, 9).

The District Court did not refer to Parratt v. Taylor, 451 U.S. 527 (1981) as the grounds for dismissing Respondent's due process claims with respect to the SCRIE Program (App. 40-42).

The Court of Appeals reinstated all of Respondent's due process claims with respect to the SCRIE Program, not just the issue of delay (App. 26-27).

REASONS FOR DENYING THE WRIT

A. The Right To A Post-Deprivation State Court Proceeding Does Not In Itself Satisfy Federal Due Process As To Violations Arising From Institutionalized Government Conduct.

Petitioners characterize Respondent's claims as being "simply" that Petitioners took too long to act on Respondent's application for payment of SCRIE rents. Petitioners state that Respondent has only alleged a chronology of events with a conclusion that the Petitioners' delay was too long (Pet. 1, 12).

These characterizations are not consistent with the pleadings (App. 58-60 pars. 32-41) nor with Petitioners' own description of Respondent's allegations (Pet. 4-5). The Court of Appeals explicitly rejected such characterizations (App. 22-23).

Based on their misdescription of Respondent's claims, Petitioners argue (Pet. 12-13) that the Court of Appeals's decision runs counter to Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), which held that a nine-month delay in holding an administrative hearing to determine whether a government employee dismissed for cause was entitled to reinstatement was not per se a violation of federal due process.

The Loudermill decision is fully consistent with the Court of Appeals's decision in this case. First, the delay in this case was not justified by any need for a hearing to resolve factual or legal issues. As Petitioners acknowledge, under applicable law Petitioners periodically

issue certificates setting forth the amounts of SCRIE rents Petitioners are required to pay owners either through real estate tax credits or in cash (Pet. 3). Thus the amounts owing Respondent are not in dispute. What is in dispute is Petitioners' refusal to pay these amounts on a reasonable and timely basis. Instead, as a condition to payment, Petitioners compel property owners to file complicated applications, with extensive supporting documentation, that are both unnecessary and unreasonably burdensome.

Second, the length of the delay here is substantially more than the nine-month period in Loudermill. Petitioners understate the delay in collecting SCRIE rents by measuring it from May 1989 and May 1990, when Respondent filed applications for delinquent rents for calendar years 1988 and 1989, respectively (Pet. 13). However, the deprivation of rent and delay in payment commenced and should be computed from the time the rents accrued under Respondent's leases with SCRIE tenants, i.e. beginning on January 1, 1988 and January 1, 1989, respectively, for those years (App. 56, pars. 22-24). By this calculation, the delay was up to 30 months as to 1988 rents and up to 18 months as to 1989 rents when Petitioner commenced this proceeding in July 1990. What is more, Petitioners apparently intended to delay payment of the rents indefinitely (App. 55, pars. 14-15).

Finally, delay is not the only issue here. Respondent here alleges that Petitioners' procedures for paying SCRIE rents violate Respondent's federal due process rights. Petitioners completely ignore Respondent's objections to the unnecessary and burdensome application process, whereas Loudermill itself held that state

procedures are subject to compliance with minimum federal due process standards (470 U.S. at 541).

Petitioners seek dismissal of Respondent's due process claims regarding their SCRIE procedures before there is any evidentiary hearing as to the reasonableness of these procedures. Petitioners assert facts not in evidence and contrary to the Amended Complaint when they argue that delay in paying SCRIE rents is necessitated by Petitioners' thorough procedures (Pet. 13). The Court of Appeals rejected such summary process, holding that a factual investigation into Petitioners' procedures was needed to determine whether they comply with federal due process, citing Mathews v. Eldridge, 424 U.S. 319 (1976) (App. 22-27).

Petitioners further contend that their SCRIE procedures and the resulting abuses are like the random and unauthorized deprivations for which state court post-deprivation relief was deemed adequate in Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) (Pet. 9).

The abuses resulting from Petitioners' administration of the SCRIE Program, being grounded in official forms and procedures, are not random and unauthorized but officially-sanctioned conduct like that for which post-deprivation hearings were deemed inadequate in Zinermon v. Burch, 494 U.S. 113 (1990) (discussed Pet. 9-10), and precisely the established state conduct to which 42 U.S.C. Sec. 1983 applies. Indeed, Petitioners assert that the delay in paying Respondent was necessary so Petitioners could verify information in owner applications for SCRIE rents (Pet. 13). If that is so, then the

paperwork and delays to which Respondent objects are predictable and inherent in Petitioners' administrative processes. The Court of Appeals found Respondent's claims arose out of established state procedures, citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (App. 21).

Petitioners argue that they cannot provide pre-deprivation due process in administering the SCRIE Program (Pet. 10-11). Pre-deprivation due process is not only possible but necessary. Petitioners' refusal to provide adequate process for paying SCRIE rents compelled Respondent to bring this litigation. Rather than provide adequate process which would make litigation unnecessary, Petitioners ask this Court to recognize the right to bring state court litigation as a substitute for due process.

To have to bring judicial proceedings to collect acknowledged government debts compounds rather than redresses the offense to Respondent's due process rights. The right to bring legal proceedings is neither practical nor adequate protection against institutionalized government abuses for owners of small buildings with low government-regulated rents.

While making lengthy and elaborate arguments as to why there is no federal due process violation here, Petitioners admit, inconsistently, that Respondent may be entitled to damages if Petitioners' SCRIE procedures violate federal due process (Pet. 8, 11). Petitioners do not suggest, however, that property owners who have to bring legal proceedings to collect SCRIE rents are entitled to their legal expenses.

B. The Existence Of State Remedies Does Not Bar Federal Courts From Considering Federal Due Process Claims.

The District Court did not base its dismissal of Respondent's due process claims upon a finding that Petitioners' abuses were random and unauthorized but upon the ground that even if Respondent were deprived of a constitutionally-protected property interest, Respondent's only recourse was to state court because New York law provided sufficient remedies (App. 40-42).

The Court of Appeals rejected this limited recourse for violation of federal constitutional rights on the basis of Monroe v. Pape, 365 U.S. 167, 183 (1961) and Patsy v. Florida Board of Regents, 457 U.S. 496, 500-501 (1982), which permit aggrieved parties to sue in federal court for violation of federal constitutional rights notwithstanding the existence of state remedies (App. 20-21). These precedents make Petitioners' argument that Respondent has the option to pursue state court remedies irrelevant since none of the precedents cited by Petitioners in support of state court remedies (Pet. 11-12) preclude litigants with federal due process claims from pursuing them in federal court.

Finally, Petitioners attempt to overcome Respondent's right to federal court recourse by vastly overstating the significance of this case. Thus, Petitioners project from their mischaracterization of Respondent's claims as being based on delay alone a flood of federal court litigation based on dissimilar facts and legal issues brought under the "lure" of attorney fees authorized by 42 U.S.C. Sec. 1988. Indeed, Petitioners imply that it is appropriate to summarily dismiss cases brought under 42

U.S.C. Sec. 1983 as a way of limiting the federal court workload, denying litigants statutory attorneys' fees, and accommodating violations of federally-protected rights assumed to be necessitated by government budget cutbacks (Pet. 7-8).

CONCLUSION

It is clear under applicable authority that Respondent is entitled to federal court review of Respondent's due process claims with respect to the SCRIE Program. There is no conflict in authority on this point.

For these reasons, a writ of certiorari to review the decision of the Second Circuit Court of Appeals should not be granted.

Respectfully submitted,

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APPENDIX A

Fifth Amendment, U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

Fourteenth Amendment, Section 1, U.S. Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

United States Code,
Title 42, Section 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.